Supreme Court, U.S.
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No. 99-285

In The

Supreme Court of the United States

MANUEL AVALOS, JR.,

Petitioner,

vs.

DON HUNTER, in his official capacity as Sheriff of Collier County,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding. In addition, the Florida Sheriff's Health Insurance Fund, which provides insurance coverage to the Respondent, is an interested party to this proceeding.

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I. STATEMENT OF THE CASE

The Petition for Writ of Certiorari is yet another attempt by the Petitioner to overturn a well founded judgment as a matter of law which was correctly entered by the trial judge based upon the complete absence of any evidence of discriminatory intent which would have supported the jury's verdict for the Petitioner. As detailed below, there is no reason for this Court to accept jurisdiction of the Petition, which is essentially a revisitation of the same factual issues presented to the Eleventh Circuit Court of Appeals. The Eleventh Circuit *per curiam* affirmed the judgment as a matter of law and then denied without opinion requests for rehearing and rehearing *en banc*.

Unable to accept the finality of the Eleventh Circuit's disposition of this meritless claim of national origin discrimination, the Petitioner now raises the same issues presented to the Eleventh Circuit in the guise of a petition for writ of certiorari. Furthermore, Petitioner improperly raises for the first time challenges to the standard employed by the trial court in resolving the Rule 50 motion, which had been articulated in Eleventh Circuit decisions.

Although the Eleventh Circuit did not explain its decision to affirm the judgment in favor of the Respondent, it is quite possible that the Petitioner's gross misrepresentation of the record, as well as the Petitioner's admissions of misconduct which led to his suspension, reassignment, and fitness for duty referral warranted a summary disposition of the appeal without oral argument by the parties. Review of the trial court's order

granting the Rule 50 motion in light of the record in this case discloses that there is no reason for this Court to grant the Petition for Writ of Certiorari.

Certiorari should not be granted except in cases in which the resolution of issues is of importance to the public, as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion between the circuit courts of appeals. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). As explained below, there is no overriding issue presented to this Court by the Petitioner, or apparent conflict among the circuit courts of appeal, which warrants the exercise of this Court's discretionary jurisdiction. Rather, Petitioner's quarrel is nothing more than an extension of his appeal to the Eleventh Circuit. However, "the Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions."[1]

A. The Petitioner Misrepresents the Record.

Petitioner's Statement of the Case misrepresents the evidence presented by the Petitioner and the Respondent at trial, omits critical facts damaging to the Petitioner's case, and represents as evidence matters that were excluded by the Court. Prior to examining the legal issues before this Court, the record must be corrected.

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[1] Hon. F. Vinson, Remarks at the Meeting of the American Bar Association, September 7, 1949.

Initially, although Petitioner attempts to relate a long and sad story of mistreatment at the hands of Kim Cherney and Susan Riley, the only issue is whether his suspension, reassignment and fitness for duty referral were motivated by Petitioner's national origin. However, neither Cherney nor Riley disciplined Avalos for his false arrest of Frederick Pray. In May of 1993, Cherney was not supervising Avalos; she had been replaced by Sergeant Kevin Nelson. As will be seen, Nelson's preliminary investigation of Avalos' misconduct ultimately led to the disciplinary action.

When Nelson assumed supervision of the fugitive warrants bureau in April, 1993, Nelson met with Avalos and his partner, Rene Figueroa. During this meeting, Avalos and Figueroa informed Nelson that they needed access to a computer to check the validity of warrants before they made an arrest on an outstanding warrant. Nelson made a computer conveniently available to them at the Immokalee substation of the Collier County Sheriff's Office and provided training to them on the use of the computer. Nelson ordered Avalos and Figueroa to check the validity of the warrants on the computer each day prior to making any arrests. (App. 2)

In June, 1993, Katina Martinez, a records supervisor at the Collier County Sheriff's Office, informed Nelson that Avalos had made an arrest on May 31 on a warrant which had been canceled four days prior to the arrest. Martinez also told Nelson that, at her request, Avalos had written a memorandum to the Clerk of the Court explaining why the suspect, Frederick Pray, was arrested on an invalid warrant. Nelson, who had not been apprised by

Avalos of the arrest, requested a copy of Petitioner's memorandum. (App. 11 (Def's Trial Exh. 3))

Nelson reviewed the memorandum and concluded that Avalos had failed to use the computer as ordered, to confirm the validity of the warrant. It was also apparent to Nelson that Avalos was attempting to cover up his role in an improper arrest. In his memorandum, Avalos stated: "This deputy attempt (sic) to contact warrants div. also records to confirm active warrant no results (holiday) no one in. Dispatch verified active, so subject was arrested on said charges." (App. 8 (Def's Trial Exh. 3)) In fact, Avalos did not contact the records office, or dispatch (communications) to confirm the warrant. Nelson had worked in the warrants office on May 31 and knew that no one from communications had come into the office to check the status of the warrant. (App. 4-5)

When Nelson informed Riley of the Pray arrest by Avalos, Riley instructed Nelson to review the communications tapes to determine whether Avalos had in fact contacted communications to verify the warrant. Nelson reviewed the tapes and interviewed the communications supervisor as well as Steve Dest, a bailiff who worked as Avalos' backup on May 31. (App. 11-12)

It was apparent from Nelson's inquiry that Avalos did not follow Nelson's directive to use the computer, and that he did not call communications to confirm the warrant as represented in Avalos' memorandum to the Clerk of the Court. Nelson recommended that Avalos be transferred to road patrol for closer supervision. (App. 12)

Upon receiving Nelson's report, Riley requested that an investigation be initiated by internal affairs. On June

18, 1993, Avalos gave sworn testimony that he telephoned the dispatcher to verify that the Pray warrant was active. He also testified that there was no policy in effect on May 31 when he arrested Pray that permitted him to use the Immokalee substation computer to verify his warrants at the beginning of his shift. (Pet. App. 16-17)

Due to the inconsistencies in Avalos' testimony and other evidence gathered by the investigation, Avalos was reinterviewed on August 25, 1993. During this second interview, Avalos testified that, contrary to his memorandum to the Clerk of the Court, he did not speak with the records section. Avalos also testified that he "made a mistake" when he earlier stated that he had contacted communications to confirm the validity of the warrant.[2]

As a result of the internal affairs investigation, Avalos was charged with inattention to duty, dereliction of duty, insubordination through failing to follow instructions of his supervisor, falsification of an official document, lying in a sworn statement, and unprofessional behavior. The internal affairs report was reviewed by Undersheriff Bob Burhans and Sheriff Hunter who jointly

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[2] Avalos attempted to explain his misrepresentations in the memorandum as "pressure" from Sergeant Nelson. (Pet. App. 17-18) This is another lie. Nelson was not present when Avalos prepared his memorandum, and was not aware that Avalos had written the memorandum until he was later contacted by Katina Martinez. (App. 4) Sheriff Hunter subsequently referred Avalos for a fitness for duty evaluation because Avalos had attributed his misconduct to stress. As noted by the trial court, the psychologist who conducted the fitness for duty examination concluded that Avalos was temporarily unfit for duty as a result of stress and alcohol related problems. (Pet. App. 20 n.3)

concurred that Avalos should be suspended for five days, given a letter of reprimand, placed on six months probation, reassigned to road patrol in Immokalee from the fugitive warrants bureau at the same rate of pay, and required to undergo a fitness for duty examination. (App. 9 (Def's Trial Exh. 9)) Riley did not have any input into this employment action.

Prior to reporting to his new assignment, Avalos took annual leave. While on leave, he resigned his position, concluding that "[I]f I can't function as a warrants officer and have to be sent to a psychiatrist, then I can't function on the road either." (App. 1-2) However, both his current supervisor, Sergeant Nelson, and his prospective supervisor, Lieutenant Roy Kipp, encouraged him to retain his appointment as a deputy sheriff and not to resign. Kipp, the Immokalee substation commander, offered Avalos a shift of his choice and a newer car. Avalos and Kipp had enjoyed a good working relationship and Kipp valued his bilingual ability. Immokalee was also Avalos' preferred location for assignment. (App. 6-7)

Upon his resignation, Avalos sent a letter to Kipp and the deputies at the Immokalee substation. The letter states in part "I, not only wanted to express to one individual, how professional you guys are, but as a whole unit. Working with the best always made me feel good to know that no matter what type of complaint or warrant arrest I answered to, I knew I was never alone." (App. 10 (Plaintiff's Trial Exh. 36))

The Petitioner, of course, chooses to overlook the egregious nature of his unlawful arrest, falsification of an official record of the agency and lying under oath, but

focuses on "repeated acts of discrimination" (Pet. 5) at the hands of Cherney and Riley years prior to his suspension and reassignment from the fugitive warrants bureau. These matters, which have no possible relevance to the disciplinary action which was imposed by the Sheriff and the Undersheriff, are fraught with inaccuracies and misrepresentations.

Petitioner overstates his performance record. Although he complains that his sick leave was closely monitored, (Pet. 6) unlike other officers, Avalos was guilty of chronic absenteeism which required closer attention by his supervisors. Avalos complains that he was required to work alone in Immokolee while "the white warrant officers worked in teams of two in Naples." (Pet. 6) Overlooked, however, is Avalos' trial testimony that once he complained, he was given a partner, and that there was no discriminatory intent on the part of his supervisors with regard to partner assignment. (App. 5)

Once partners were assigned to Avalos, he had ongoing conflicts with his co-workers. He failed to properly frisk a juvenile on one occasion, and on other occasions Avalos would leave work early, depriving his partner of backup. On numerous occasions, Avalos excluded partners from conversations with suspects by speaking Spanish when English was known.[3] Another partner

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[3] Petitioner represents that he was disciplined for speaking Spanish while interacting with people in the Immokalee community who were primarily Spanish speaking. This is absolutely false. Avalos admitted at trial that he was counseled by Cherney for speaking Spanish to suspects in the presence of his English speaking partners when English was known and

complained about Avalos driving around Immokalee looking for suspects rather than checking fugitives' residences.

Finally, although Petitioner represents that Riley had no concerns about Petitioner's job performance, she recommended to Sheriff Hunter in December, 1992, his reassignment, fitness for duty evaluation, or termination, because she was aware of the concerns of his partners Although Riley concluded that Avalos was not a team player and recommended a change in his status, no action was taken by Sheriff Hunter on Riley's recommendations.

In reviewing the record in its entirety, the trial court correctly concluded that there was no evidence for a reasonable jury to find that Riley's dissatisfaction with the Petitioner's attitude and work habits constituted evidence that she was biased against the Petitioner due to his Mexican ancestry. (Pet. App. 25) In short, there is no evidence that the suspension, reassignment, and fitness for duty evaluation were motivated by anything other than Petitioner's misconduct.[4]

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understood. In fact, Avalos spoke Spanish without limitation at the Sheriff's Office and in the field. (App. 6)

[4] Even though Nelson was instrumental in achieving Petitioner's disciplinary action, including reassignment, the Petitioner never accused Nelson of being biased against Avalos because of his national origin. See Order of the trial court, Pet. App. 26. There is no evidence of any discriminatory animus by Nelson. To the contrary, he was married to a Mexican-American.

B. The Petitioner Misrepresents the Trial Court's Holding In Granting the Motion For Judgment As A Matter Of Law.

According to the Petitioner, the Magistrate improperly required him to demonstrate that there was substantial conflict in the evidence to support a jury question in order to defeat the motion for judgment as a matter of law. Such a burden, argues the Petitioner, created a conflict with *Berry v. United States*, 312 U.S. 450 (1941) which required evidence from which a reasonable jury could find for the nonmoving party. Once again, Petitioner misleads the Court.

In support of his argument, the Petitioner quotes *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 439 (11th Cir. 1996), which states in part that in order for the nonmoving party to survive a motion for judgment as a matter of law, there must be more than a scintilla of evidence; there must be a substantial conflict in the evidence to support a jury question. (Pet. App. 12)[5] However, this quote, which was cited by the Magistrate in the order granting the Rule 50 motion, is taken out of context.

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[5] *Isenbergh* was not "expressly disapproved" by the Eleventh Circuit in *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997) as Petitioner represents. In *Combs*, the court disapproved certain dicta in *Isenbergh* which questioned the interpretation of *St. Mary's Honor Society v. Hicks*, 509 U.S. 502 (1993) established by the court in *Howard v. BP Oil Co.*, 32 F. 3d 520 (11th Cir. 1994). Although Petitioner gives the impression that *Isenbergh's* Rule 50 analysis was rejected by Combs, no such disapproval occurred. See, *Combs*, 106 F. 3d at 1532-1535.

In the order, the trial court initially presented the standards for resolving a Rule 50 motion which had been summarized in *Isenbergh*. The court then remarked that while the standards had been well settled, their application in employment cases was not entirely clear. (Pet. App. 13) The court concluded that the proper inquiry to be undertaken is whether "viewing the evidence in the light most favorable to the plaintiff, the jury could reasonably find that the Sheriff discriminated against him because of his Mexican ancestry." (Pet. App. 14) The Magistrate never required Petitioner to present a substantial conflict in the evidence to avoid judgment for the Respondent.

It is quite apparent from reviewing the order that the trial court acted in accordance with *Berry* and decisions of the Eleventh Circuit which are consistent with *Berry's* holding. Indeed, after considering the entire record, including evidence presented by the Plaintiff, the court concluded, "In sum the plaintiff has failed to present any evidence from which a jury could reasonably conclude that the Plaintiff's Mexican ancestry was one of the reasons for the discipline he received for his misconduct." (Pet. App. 27-28)

Ironically, in reaching its decision, the trial court followed *Richardson v. Leeds Police Department*, 71 F.3d 801 (11th Cir. 1995) which had been submitted by the Plaintiff as supplemental authority regarding the standard to be applied by the court in ruling on a motion for judgment

as a matter of law. (Pet. App. 14)[6] In *Richardson*, the Eleventh Circuit held that when evaluating a Rule 50 motion, the district court must consider all of the evidence and reasonable inferences in the light most favorable to a nonmoving party. Further, the court held that a judgment as a matter of law may be affirmed on appeal when the facts and inferences point so overwhelmingly in favor of the moving party that reasonable people could not arrive at a contrary verdict. 71 F.3d at 805. The trial court's reliance on *Richardson*, therefore, only highlights the complete absence of support for the Petitioner's claim that he was required to demonstrate a substantial conflict in the evidence.

II. REASONS FOR DENYING THE PETITION

A. The Petition Should Be Denied Because the Petitioner Failed to Challenge the Rule 50 Standard in the Proceedings Before the Eleventh Court of Appeals.

Although Petitioner argues at length that the trial court improperly imposed a burden of establishing a "substantial conflict in the evidence" to defeat the motion for judgment as a matter of law, and that such a standard

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[6] The Respondent had argued that the trial court should revisit the prima facie case in considering the Rule 50 Motion. The Court, relying on *Richardson*, and this Court's decision in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), rejected this argument. The inquiry, ruled the court, would be whether reviewing the evidence in the light most favorable to the Petitioner, a reasonable jury could find that the Respondent discriminated against him because of his national origin. (Pet. App. 14)

conflicts with *Berry v. United States* and other circuit court opinions, this issue has never been raised below. Rather, Petitioner was content to accept opinions of the Eleventh Circuit Court of Appeals, and the standard embraced by those opinions, when arguing that the record warranted a reversal of the judgment as a matter of law.

For example, the "Standard of Review" set forth in Petitioner's Initial Brief to the Eleventh Circuit cites *Olmsted v. Taco Bell Corp.*, 141 F.3d 1457 (11th Cir. 1998). (App. 13, 14) Significantly, the court in *Olmsted* held that the court's task in reviewing a judgment as a matter of law was to resolve all reasonable inferences in favor of the nonmoving party and that "[T]here must be a substantial conflict in evidence to support a jury question." *Id.* at 1461, quoting *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). Petitioner never took exception to any inquiry concerning a substantial conflict in the evidence and certainly never represented to the Eleventh Circuit that such a standard conflicted with *Berry*, or any opinions of other circuits.

Petitioner, therefore, is now raising an argument which neither the Eleventh Circuit nor the district court had an opportunity to resolve. Because this issue of an incorrect standard for determining a Rule 50 motion was not raised below, it is not open for review by this Court. *Seminole Tribe of Florida v. Florida*, 517 U.S. 43, 61 n. 10 (1996); *Ellis v. Dixon*, 349 U.S. 458, 460 (1955).

B. There is Insufficient Conflict Among the Circuit Courts of Appeals Regarding Consideration of Rule 50 Motions To Warrant Certiorari Review By This Court.

Contrary to Petitioner's representation, there is no substantial conflict among the circuits regarding the proper standard to be applied in determining the Rule 50 motion. Petitioner is apparently contending that if a court considers whether there was a substantial conflict in the evidence in ruling upon a motion for judgment as a matter of law, an impermissible burden is placed upon the nonmoving party to defeat the motion. This is incorrect.

When Courts have referenced "substantial conflict in the evidence" or "substantial evidence" in their Rule 50 inquiry, there has been no intent to exact a more demanding standard upon the nonmoving party.

The Petitioner has placed undue emphasis on the terms "substantial conflict" or "substantial evidence." In speaking to this terminology, *Wright and Miller* have commented:

> A number of decisions say that the motion for judgment as a matter of law must be granted unless there is "substantial" evidence in opposition to it. It is very doubtful that the adjective adds anything of value, particularly when, as in a leading case,[7] "substantial" evidence is

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[7] The leading case referenced by *Wright and Miller* is *Boeing Co. v. Shipman*, 411 F. 2d 365 (5th Cir. 1969) in which the Fifth Circuit characterized "substantial evidence" as "evidence of

> defined in terms of evidence that would lead reasonable people to different conclusions. 9A *Wright and Miller,* Federal Practice and Procedure § 2524. (2d ed. 1995).

In short, there is no conflict between opinions of the Eleventh Circuit which refer to "substantial conflict in the evidence" and opinions of this Court or other circuits which do not use this terminology. There is simply no support for Petitioner's argument that the Eleventh Circuit places a greater burden on the party opposing a Rule 50 motion.

Similarly, any diversity among the circuits regarding consideration of all of the evidence or only the Plaintiff's evidence in ruling upon a motion for judgment as a matter of law does not warrant certiorari jurisdiction by this Court. The ultimate inquiry is whether a fair minded jury could return a verdict on the evidence presented. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252. (1986) Each case cited by the Petitioner requires the evidence to be viewed in the light most favorable to the Plaintiff and examines whether a reasonable jury could arrive at a contrary verdict. *See, Jiffy Markets, Inc. v. Vogel,* 340 F.2d 495, 498 (8th Cir. 1965); *CPC Int'l, Inc. v. Northbrook Excess and Surplus Insurance Co.,* 46 F.3d 1211, 1214 (1st Cir. 1995); *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (1969). Accordingly, any distinctions among these opinions is insufficient to warrant a certiorari review by the Court.

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such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *See also, Wells v. Warren Co., Inc.,* 328 F.2d 666, 668-669 (5th Cir. 1964).

C. The Trial Court's Review of the Evidence In This Case Does Not Conflict With Opinions Of Other Courts of Appeals.

Although Petitioner argues that the trial judge made credibility determinations and, as a result, the court's order conflicts with opinions of other circuits which prohibit the trial judge from weighing the evidence, there is no merit to this contention. Indeed, the same argument that the trial judge weighed the evidence and neglected inferences favorable to the Plaintiff was presented to the Eleventh Circuit and properly rejected in the *per curiam* affirmance. It is quite obvious that the Petitioner is merely rearguing the same issues that were presented to the Eleventh Circuit in his unsuccessful attempt to reverse the judgment as a matter of law.

Petitioner at great length cites instances in which the trial judge found that the Petitioner was untruthful. Overlooked in this argument, however, is that Avalos was disciplined not only for his false arrest, but for misrepresenting the truth in his memorandum and in his internal affairs interviews. It was incumbent upon the trial court in considering the Rule 50 motion to determine if a reasonable jury could disbelieve the proffered reasons for the discipline. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997).

In particular, the trial judge was required to evaluate whether the Petitioner had demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find them unworthy of credence." *Id.* quoting *Sheridan v. E.I.*

DuPont de Nemours & Co., 100 F.3d 1061, 1072 (3d Cir. 1996) (*en banc*); *see also, St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Thus, when the Magistrate examined the record to determine whether there was sufficient evidence for a reasonable jury to disbelieve the Respondent's decision to discipline the Petitioner for misrepresenting the truth, the trial judge was correctly following well established precedent of this Court.

When reviewing the record, the Magistrate needed to look no further than Petitioner's trial testimony. On cross-examination, Avalos admitted that he had been trained to use the computer to verify warrants, that he disobeyed a direct order from Nelson to use the computer and that he was untruthful when he represented in his memorandum to the clerk of court that he contacted the records office to confirm Pray's warrant. (App. 2, 4-5) In view of these admissions, a reasonable jury could not conclude that the stated reasons for the Petitioner's disciplinary action were pretextual.

No conflict, therefore, is apparent between the standard applied by the trial court in granting the motion for judgment as a matter of law and opinions of this Court. Petitioner has asserted no basis for certiorari jurisdiction on this issue.[8]

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[8] Petitioner's argument that the Court should grant certiorari because new grounds were allegedly raised in Respondent's Rule 50 motion is equally meritless. An application of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by the Supreme Court. *Appalachian Power Co., v. American Institute of C.P.A.*, 361 U.S. 82, 80 S. Ct. 16, 18 (1959). The Court is particularly reluctant to

D. The Holding of the Trial Court Regarding the Absence of Disparate Treatment Does Not Conflict with Precedent of this Court.

The Petitioner argues that the trial court's disparate treatment analysis conflicts with *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), by requiring "precise equivalence" of the comparators. (Pet. 26, 27) Again, the Petitioner is less than candid with the Court.

Although the trial court acknowledged that Eleventh Circuit opinions on disparate treatment were not entirely consistent concerning the degree to which comparables must be similar. (Pet. App. 24),[9] the court applied the

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grant certiorari jurisdiction when, as in the present case, the question is one that concerns the judgment of the court to a particular set of facts. *Id.* Moreover, the issue of an employer's "honest belief" is embraced in the employer's burden of articulating a legitimate, nondiscriminatory reason for disciplinary action. *See, Jones v. Gerwens*, 874 F.2d 1534, 1540, (11th Cir. 1989). The Respondent argued that it met this burden in its Rule 50 motion at trial.

[9] For example, in *Nix v. WLCY Radio/Rahall Communications*, 738 F. 2d 1181, 1185 (11th Cir. 1984) the court required a claimant to show that the misconduct for which he was disciplined was "nearly identical" to the misconduct of other employees who were treated less severely. In *Jones v. Gerwens*, the panel concluded that a plaintiff must show that he engaged in misconduct "similar" to that of a person outside the protected class and that the disciplinary action imposed against him was more severe than that enforced against the others who engaged in "similar misconduct," 874 F. 2d at 1540. Recent opinions of the Eleventh Circuit have settled on a "same or similar" standard, holding that it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways. *See, Holifield v.*

standard most favorable to the Petitioner. Upon considering the comparables offered by Petitioner to establish discriminatory intent, the court determined that they were not "similar" to Petitioner's misconduct and could not be used for comparison. (Pet. 22)

In his closing argument to the jury, Petitioner argued two incidents for comparison to establish disparate treatment. One of the incidents involved an attempt by deputies Todd Taylor and Rene Figueroa to execute an arrest warrant, which was *facially valid*. Contrary to the Petitioner's representation, (Pet. 9-10, 27) no unlawful entry or excessive use of force occurred.

Deputy Figueroa testified at trial to the events which occurred when they attempted to execute the arrest warrant.

> [W]e were looking for Ms. Parker's husband and I was the one who knocked on the door and finally, Ms. Parker came out and answered the door, and she told me that her husband was not there.
>
> Deputy Taylor came around and told me that there was a male subject inside the residence and we needed to identify that person.
>
> We do have the right to go in and if the person's home – if we have reason to believe the person is in the house. And that's all we wanted to do, is go in and verify that identity of the

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Reno, 115 F. 3d 1555, 1562 (11th Cir. 1997); *Jones v. Bessemer Carraway Med. Ctr.*, 137 F. 3d 1306, 1311 (11th Cir. 1998), *modified on reh.*, 151 F.3d 1321 (11th Cir. 1998); and *Maniccia v. Brown*, 171 F. 3d 1364, 1368 (11th Cir. 1999).

> person, which we believed it was the wanted person.
>
> Miss Parker was blocking our way and she denied our entry.

(Volume 2, trial proc. p. 77)

When questioned about Taylor's physical contact with Ms. Parker, Figueroa replied " I believe it was just a body contact when we were trying to gain entry. It was not on purpose." (Volume 2, trial proc. p. 79). When asked if Taylor violated any policies, Figueroa responded "No he didn't . . . We did have an internal investigation, and we were cleared of any wrongdoing." *Id.* at 72. Unlike Avalos' misconduct, there was no evidence that Taylor made a false arrest, disobeyed an order, falsified a document, or lied under oath. In view of Figueroa's testimony, which was uncontradicted, the trial court properly concluded that Taylor was not a valid comparator for determining that the Petitioner was punished too harshly for his misconduct. (Pet. App. 23)

The second incident concerned the conduct of Deputy J.J. Carroll during a landlord-tenant dispute. According to Carroll, when the landlord, Grady Pruette, was informed that the deputies would not evict the tenant without a court order, Pruette became belligerent and threatened the officers. Deputy Rose, rather than Carroll, arrested Pruette for disorderly conduct. Neither Carroll nor Rose committed a false arrest, disobeyed an order, falsified a report of the incident, or lied about the events which had occurred. For this reason, the trial court properly concluded that the matter was not sufficiently

comparable to raise an inference of discriminatory treatment. (Pet. App. 24)[10]

The Petitioner now argues that his backup at the time of the Pray arrest, Steve Dest, was similarly situated. However, Dest, a bailiff with the Sheriff's Office, was merely acting as a backup to Avalos when Pray was arrested. Dest relied upon Avalos to determine if the arrest was valid. (App. 15-16)[11]

Petitioner also cites as a comparable "Officer Tritt's falsification of his time sheets." (Pet. 27) There is *no evidence* in the record that Deputy Tritt falsified his time sheets. Once again Petitioner misleads the Court by deliberately misstating the record in this case.

Thus, in reviewing the trial court's order in light of the evidence in this case, it can only be concluded that there is no conflict between the disparate treatment standard applied by the court and *McDonald v. Santa Fe Trail Transportation Co.*. The Petitioner has failed to provide this Court with any basis to assert certiorari jurisdiction in this case.

---

[10] Petitioner misrepresents the record by stating that Respondent paid Pruette more than $37,000.00 "for the false arrest and excessive use of force perpetrated by Carroll" (Pet. 10) As Petitioner is well aware, the trial court excluded any evidence of settlement of Pruette's claim pursuant to Rule 408, Fed. R. Civ. P.

[11] Petitioner also accuses Dest of lying. This was never argued to the jury, and there is no evidence that Sheriff Hunter was aware that Dest had "lied" as Petitioner alleges. Petitioner fails to mention that Dest was later terminated for on duty misconduct (App. 16), which completely undermines any contention of disparate treatment between these two officers.

E. The Trial Court's Holding In Determining That The Petitioner Was Not Constructively Discharged Does Not Conflict With Opinions Of Other Circuits.

The Petitioner argues that because the trial court did not consider the involuntary transfer to be a constructive discharge, the trial court's ruling conflicts with opinions of the Eleventh Circuit and other circuits. (Pet. 28, 29) The asserted conflict is advanced by the Petitioner as a vehicle to pursue an argument that was rejected by the district court and the Eleventh Circuit.

There is certainly no conflict among the circuits regarding the objective standard for constructive discharge. It is well settled in the Eleventh Circuit that a constructive discharge arises if an employee involuntarily resigns in order to escape intolerable and illegal employment requirements to which he or she is subjected because of race, color, religion, sex or national origin. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); to the same effect *see, Young v. Southwestern Savings and Loan Assoc.*, 509 F.2d 140, 144 (5th Cir. 1975). *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3rd Cir. 1992), cited by the Petitioner in support of the "conflict", compares favorably to *Henson* by requiring conduct which is so unpleasant or difficult that a reasonable person in the employee's shoes would resign.

The circumstances confronting the Petitioner following his reassignment could hardly be described as intolerable. Indeed, the Magistrate, in considering Petitioner's argument of constructive discharge, accurately described

the claim as "preposterous". (Pet. App. 28) It is undisputed that following Petitioner's transfer to road patrol in Immokalee, where he preferred to work, Petitioner was offered a choice of shift and a newer vehicle. His new supervisor encouraged him to stay and valued his bilingual abilities. (App. 7) Indeed, Avalos thought so highly of the personnel to whom he had been assigned that upon resigning he wrote a letter to the substation commander praising them for their professionalism. (App. 10)

It is quite telling that the Eleventh Circuit thought so little of the Petitioner's arguments that it affirmed the judgment as a matter of law without opinion or oral argument. Petitioner has engaged in a fruitless effort to convince the Court that conflict exists and that certiorari jurisdiction is appropriate. The Petition of Writ of Certiorari, however, does not present any basis for this Court's further review.

CONCLUSION

In view of the authorities cited above, and the record in this case, the Petition should be denied.

Respectfully submitted,

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WILLIAM E. POWERS, JR., ESQUIRE
Florida Bar No.: 220566

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Attorneys for Respondent
**Counsel of Record*

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MANUEL AVALOS, JR., **Plaintiff,** **vs.** **DON HUNTER, SHERIFF OF COLLIER COUNTY,** **Defendant.**	**No. 95-206-CIV-PTM-23** **TAMPA, FLORIDA** **December 11, 1996** **9:30 a.m.**

VOLUME 1
TRIAL PROCEEDINGS
BEFORE THE HONORABLE THOMAS C. WILSON,
United States Magistrate Judge, and a jury

[p. 136] A I talked to Sergeant Nelson about taking some time off in order to go ahead and clear my head of what came about, the reprimand, the suspension and all that. I told them I needed to try and clear my head and take some time off. I had almost a month of annual leave, not administrative leave.

Q Mr. Dietzen said you were placed on administrative leave at the expense of the sheriff's department; is that true?

A No. I had about a month of annual leave that I had accumulated, my vacation time. It was my time.

Q It was during this time that you were off you decided to resign your position?

A Right.

Q What was going through your mind at the time that you decided to resign you position?

A Just like I stated before, in one of my letters of my resignation, if I can't function as a warrants officer and have to be sent to a psychiatrist, then I can't function on the road, either. It was very painful being shot down with all of these charges. Who is going to feel like going back to work?

* * *

CROSS-EXAMINATION OF MANUEL AVALOS

[p. 140] By MR. DIETZEN:

Q Mr. Avalos in May of 1993, you had special training to use the computer in Imoccolee, did you not?

A Yes, sir.

Q Along with that training, you had a direct order from your supervisor to use that computer to verify arrest warrants, did you not?

A Yes.

Q On May 31, 1993, did you follow that direct order to use the computer to verify arrest warrants?

A I failed to use that.

Q Now, prior to going on your shift on May 31, 1993, Mr. Dest (phonetic) rode along with you, correct?

A Correct.

Q He was just an observer, wasn't he?

A He was part of Collier County, wears a uniform just like I do. He's not an observer.

Q He's not an observer?

A I don't think he was an observer. He was just part of the department.

[p. 141] Q Do you remember your deposition which was taken – just one moment.

Do you remember your deposition which was taken in March of 1996, when you were under oath?

A Taking a deposition, yes.

Q Do you remember when you were asked questions about whether Mr. Dest was – what his role was?

A I would have to see the paperwork to recollect my memory.

Q Do you remember the following question on page 149: "QUESTION: And whose decision was it where to drive to? Was it yours or was it Mr. Dest's? "ANSWER: Well, Mr. Dest was just a rider. He was there to assist me in case I get into conflicts or physical apprehension."

MR. GARCIA: Your Honor, could I ask him to read the next two lines for context?

THE COURT: All right.

BY MR. DIETZEN:

Q "QUESTION: Was he your backup?

"My backup.

"And you decided where to go?

"Uh-huh."

Now, when you decided where to drive – and one more mention on that.

[p. 142] Do you remember the following question, page 152, line 18:

"QUESTION: When you got back to the car, do you remember if you called or if Mr. Dest called to verify? "I made the phone call. Dest didn't do anything. He was just an observer. I was the one making the phone call."

Do you remember that response?

A I don't agree to that.

Q Would you agree that Mr. Dest was just an observer?

A No.

Q Now, when Ms. Katina Martinez confronted you and told you there was an invalid warrant served, did you go to Lieutenant Nelson and advise him of this?

A When Katina Martinez called me at the warrants office, I didn't know there was a bad warrant. When Katina called me, she wanted me to just make a little note so that she could go the Clerk's Office and straighten the mess up.

Q Once Katina told you there was a bad warrant, you never went to Lieutenant Nelson and told him that, correct?

A She told me that she was going to straighten the mess out.

Q I'm not asking what she told you. You never, after you learned there was an arrest on an invalid warrant, you never went to your supervisor and explained that, correct?

[p. 143] A I never went to the supervisor because I didn't have no reason to.

Q Now, when Ms. Martinez requested you to write that note, was it just you and her sitting there and writing that note?

A She wasn't there.

Q She wasn't there. So you were by yourself writing that note?

A That's right.

Q In that note, did you say you contacted the records division to verify this warrant, but no one was in because it was a holiday?

A I believe that's it.

Q And that's not true, is it?

A Would you repeat the question?

Q In the note that was submitted to the Clerk of Court, you stated that you contacted the records division before you arrested Mr. Pray, but it was a holiday and no one was in?

A That's correct.

Q You did not contact Records on that day, did you?

A That's correct.

Q And in that same note, you also indicated you contacted Dispatch, did you not?

A Yes.

[p. 144] Q Now, during your Internal Affairs investigation about this incident, were you given a full opportunity to tell your side of the story?

A Yes.

Q Now, you testified earlier that you did not have a partner for a certain period of time, but yet the other officers in Naples had a partner; is that correct?

A That's correct.

Q That was a period of about six months?

A Give or take, I believe.

Q For a period of about six months. Once you complained, you received a partner; is that true?

A That's correct.

Q You are not claiming that they did not give you a partner because you are Mexican-American, are you?

A I didn't say that.

Q I just wanted to make it clear that that's not an issue, that you don't believe they are discriminating against you by not giving you a partner.

A That's correct.

* * *

[p. 146] Q Now, with respect to some counseling and Kim Cherney, did Ted Bruglio ever personally tell you that he had a problem with you speaking Spanish to a bilingual suspect?

A No.

Q He never told you that?

A No.

Q Wasn't the counseling with Kim Cherney solely about you were speaking Spanish when English was known and understood by the suspect?

A The counseling with Ted Bruglio and I was that Ted could not get along with me. That was one of the issues of counseling.

Q But wasn't one of the issues also – and it was in writing and you read it – that Ted was complaining that you were speaking Spanish when English was

known and understood by the suspect, not on all occasions, correct?

[p. 147] A I think the paperwork had it down as speaking Spanish when English was known and understood, but I was never told that he was having a problem with me about my speaking Spanish.

Q You were told at this counseling session, correct?

A Afterwards, yes.

Q At this counseling session. Now, you spoke Spanish freely at the Collier County Sheriff's Office, didn't you?

A Yes.

Q And you spoke Spanish freely in the office and out in the field, correct?

A Correct.

Q Now, once you were advised of the disciplinary action by Sheriff Hunter, the five-day suspension, did you have a conversation with Lieutenant Kip?

A Yes.

Q Did Lieutenant Kip offer you a shift of your choice and a newer car if you came to Imoccolee on the road patrol?

A I think that's what he said.

Q You and Lieutenant Kip had a generally good working relationship, didn't you?

A Yes.

Q And Lieutenant Kip wanted you on that shift and he told you that, didn't he?

A Yes.

Q And at that time, did Lieutenant Kip send an officer to your home encouraging you not to quit?

A Yes.

Q What did that officer tell you?

A He came to the house and told me that if I had some thoughts of quitting, I should not quit; that Lieutenant Kip wanted me to stay on because I was Mexican-American and he could use a person like me in my field or in his field of road patrol to help out with interpretation or investigations or whatever. He didn't want me to quit.

Q And you believed him, didn't you?

A Yes.

* * *

I WHOM IT MY CONCERN;
COLLIER COUNTY CLERK'S OFFICE

ON 5-31-93 AT APPROX. 0930 A.M. (MEMORIAL DAY) PROCEEDED TO 501 PALMETTO AV. APT #116 REF; EXECUTION OF A WARRANT. ON ARRIVAL MET WITH B/M FREDERIC PRAY AT SAID APT. AND PLACED UNDER ARREST. MR PRAY STATED THAT, HE COULD'NT UNDERSTAND THE PROBLEM, BECAUSE PROBATION HAD CONTACTED HIM AND ADVISED HIM HIS PROBATION HAD BEEN TERMINATED. THIS DEPUTY ADVISED HIM TO PRODUCE SOME KIND OF PAPERWORK TO CONFIRM HIS TERMINATION, WHICH NOTHING WAS PRODUCE. THIS DEPUTY ATTEMPT TO CONTACT WARRANTS DIV. ALSO RECORDS TO CONFIRM ACTIVE WARRANT WITH NO RESULTS (HOLIDAY) NO ONE IN. DISPATCH VERIFIED ACTIVE SO SUBJECT WAS ARRESTED ON SAID CHARGES. VIOL. ST. PROB WARRANT A1-317-CFA-TB. LATER TO FIND OUT WARRANT WAS CANCELLED 05-27-93, REASONS FOR CONFUSION 06-03-93.

DEPUTY SHERIFF'
WARRANT BUREAU
MANUEL AVALOS JR BADGE #240

SHERIFF DON HUNTER
Collier County Govt. Complex Bldg J
3301 Tamiami Trail, East, Naples, Fl 33962
Telephone (AC 813) 774-4434

MEMORANDUM

TO: Deputy Manual Avalos, #240

FROM: Bob Burhans, Undersheriff

DATE: October 11, 1993

RE: Disciplinary Action
Professional Responsibility Case 93-21

As a consequence of your actions on May 31, 1993 in the matter of arrest of one Frederick Pray and subsequent investigation, you are found to be guilty of:

a. inattention to duty

b. dereliction of duty

c. insubordination – failure to follow specific instructions of Supervisor

d. falsification of an official document

e. lying (perjury) in a sworn statement

f. unprofessional behavior, thus discrediting CCSO

Accordingly, the following disciplinary action is awarded:

a. five (5) days suspension from duty without pay;

b. letter of reprimand; and

c. probation for a period of six (6) months from this date.

This Memorandum will serve as notice that you are reprimanded herewith.

Be advised that notice of this action will serve additionally to inform you that this is final warning. Continued or further failure to perform your duties properly may result in termination.

By copy of this Memorandum, Susan Riley, Director of Judicial Division, is directed to initiate Change of Status action to reflect suspension from duty without pay as set forth herein.

BB:jab

cc: Captain Jim Sanders, Uniform Division
Susan Riley, Director of Judicial Division
Professional Responsibility Unit
Personnel File
File

App. 12

MEMORANDUM

To: Immokalee Substation District Eight
Lt. Roy Kipp, Road Patrol Division
Lt. Gene Cook, C.I.D. Unit

From: Manuel Avalos, Jr.

Date: November 1, 1993

I, not only wanted to express to one individual, how professional you guys are, but as a whole unit.

Working with the best always made me feel good, to know that no matter what type of complaint, or warrant arrest I answered to, I knew I was never alone.

I regret having to leave with short notice, and for those of you, thanks for your moral support!

If there's anything, no matter how big or small, I can help with, I'll always remember "my oath, to serve and protect".

Sincerely,
Manuel Avalos, Jr.

cc: file

To: Susan Riley, Director

From: Sgt. Kevin Nelson

Re: Employee Misconduct

Date: 10June93

On June 03, 1993 I became aware of a possible false arrest situation involving D/S Manual Avalos. Katina Martinez in Central Records called me and informed me that Avalos had arrested a man on a warrant that had been recalled four days earlier. She said that Avalos had confirmed the warrant through Communications prior to the arrest. She then told me that Central Records had requested that Avalos prepare a written statement for the Clerk of Courts, in case it was needed to rectify the situation. I asked Katina to send me a copy of Avalos' statement, because to this point, I had not been notified.

I initially thought that someone in Communications had made a mistake which would require some remedial training to correct, and that Avalos had neglected to advise his supervisor of a situation that placed a great deal of potential liability on the Sheriff and the agency. After reading his hand written memo he delivered to Katina, I knew that we were faced with a deputy that was obviously lying in an attempt to cover a mistake. He made statements in the memo that he tried to contact the warrants office, Central Records and finally communications, only locating someone in communications. I was in the warrants office all day and there were three people working their regular shift in records.

I made contact with Pauline Thomas (at your request) and she assigned one of her people to help me research

the communication tape. The tape was researched from approximately 0845 to 0936 for the date of May 31, 1993. The following entrys are all that were found on all phone lines and radio channel one.

> 0854 – Avalos phones communications to verify a warrant on Philome Etienne. It was confirmed and the subject turned himself in on the following day, at the substation.
>
> 0922 – Avalos advises dispatch (ch1) that he has a 10-15 and is 10-51 to the jail. (Pray, Frederick)
>
> 0925 – Avalos advises dispatch that he is 10-06 at the jail.
>
> 0936 – Avalos advises dispatch that he is 10-08 from the jail.

Today, I spoke with Steve Dest from the Bailiff Bureau who rode with Avalos on the 31st, 7:00 am to 2:00 pm. I asked him if he recalled the arrest that they made that day. He advised that he did and it was the only one they made, although they went to six different homes. I asked if he recalled Avalos making any phone calls at this subject's home, in the car, or at the jail, pertaining to the warrant. He said Avalos did not make any calls. He also said that the subject did not question their presence and knew that there was a warrant on file, and went along freely.

As you know, Kim and I went to Immokalee last month and made arrangements with Lt. Kipp for the warrants deputies to use one of the computers in the substation to verify their warrant packets prior to beginning their shift. With his permission to use the computer, both Avalos and Figueroa were brought to Data Processing where they

received training and a password. The dates of the meeting and their training are available.

With this procedure in place, it is virtually impossible to make a false arrest, and it eliminates the need for them to constantly call our office or communications for their verifications.

It appears that Avalos is resistant to new procedures even though they are to safeguard the agency. He has shown a complete disregard for supervision by not notifying his supervisor immediately when he became aware of a possible false arrest situation. By choosing instead to make a poor attempt to cover up his mistake and place the agency and his supervisors in a very libelous situation, he has violated numerous General Orders.

My recommendation to you is that Avalos be transferred from his current, high liability position to the position of patrol deputy, where he will be under direct supervision. I have attached a copy of his 'memo' and the booking sheet for your perusal. The arrested person in: Frederick Pray

501 Palmetto Ave.
Immokalee, Fl
Warrant #91-317-CFA-TB

Thank you for your assistance and guidance in this matter.
KN/kn
:attachments
cc:file

UNITED STATES COURT OF APPEALS
ELEVENTH JUDICIAL CIRCUIT
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

MANUEL AVALOS, JR.,

Appellant,

vs.

DON HUNTER, in his official Capacity as Sheriff of Collier County,

Appellee.

_____/

CASE NO.:97-2920; 97-3398
DC DKT NO: 95-206-CIV-FTM-23D

INITIAL BRIEF

ON APPEAL FROM THE U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Respectfully submitted,

GARCIA, ELKINS & CARBONELL, P.A.
ISIDRO M. GARCIA, ESQUIRE
The Citizens Building, Suite 802
105 South Narcissus Avenue
West Palm Beach, FL. 33401
(561) 832-8803
Florida Bar No. 437883

* * *

STANDARD OF REVIEW OF TRIAL COURT'S GRANT OF JUDGMENT AS A MATTER OF LAW

This Court reviews *de novo* the trial court's grant of renewed motion for judgment as a matter of law. *Olmstead v. Taco Bell Corporation*, F. 3d, 11 Fla. Law Weekly Fed. C1438 (11th Cir. May 28, 1998, Case No.: 97-2223). In reviewing the sufficiency of the evidence to support the jury's verdict, the reviewing court draws all reasonable inferences in favor of the nonmovant. *Morro v. City of Birmingham*, 117 F. 3d 508, 513 (11th Cir. 1997). As this Court just recently proclaimed in *Olmstead*: "We have previously noted that, in conducting our review of a renewed motion for judgment as a matter of law after a jury has rendered its verdict, '[w]e must determine whether the evidence is such that, *without weighing the credibility of witnesses or otherwise considering the weight of the evidence*, there can be but one conclusion as to the verdict that reasonable men could have reached.' " *Olmstead, supra*, 11 Fla. L. Weekly Fed. at C1439 (citations omitted, emphasis added).

As will be demonstrated, after denying defendant's motion for judgment as a matter of law on the claim in which plaintiff prevailed, the trial court purported to revisit the credibility of the plaintiff and sufficiency of the evidence to rescue the defendant from the jury's verdict. There was no justification or basis for the trial court to usurp the fact finding and credibility determination functions from the trier of fact.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MANUEL AVALOS, JR.,	**No. 95-206-CIV-PTM-23**
Plaintiff,	**TAMPA, FLORIDA**
vs.	**December 11, 1996**
DON HUNTER, SHERIFF OF COLLIER COUNTY,	**9:30 a.m.**
Defendant.	

VOLUME 1
TRIAL PROCEEDINGS
BEFORE THE HONORABLE THOMAS C. WILSON,
United States Magistrate Judge, and a jury
(Depositional Testimony of Steve Dest).

* * *

[p. 164] Q. Please state your name for the record.

A My name is Steve Dest, D-E-S-T.

Q Were you employed by the Collier County Sheriff's Department at one time?

[p. 165] A. I was.

Q In what capacity?

A As a deputy sheriff, I worked, I was a bailiff in a court.

Q For how many years?

A Approximately four and-a-half years.

Q Did you have any other duties aside from bailiff?

A I occasionally worked the roads during a holiday, because if you took a holiday off, you lost your vacation time, and I worked the warrants section on a holiday or when it was quiet in the courthouse.

* * *

[p. 169] Q And what was your primary duty as a bailiff?

A Working the courthouse.

Q Okay. And when you worked on this particular day with Mr. Avalos, was your function just to back him up?

A Yes, tag along. That way instead of losing – like I say, if you didn't work the courthouse or if that was a holiday – I'm not sure if that was a holiday or not. If you didn't work that day, they take eight and-a-half hours of vacation time from you. So instead of losing vacation time or if it was a quiet day and I could have took my vacation, I'd just as soon not take it out and lose it, so I worked with Manny Avalos.

Q Okay. But you relied on Mr. Avalos as a warrants deputy to determine whether or not a warrant was valid, did you not?

A Yes.

Q And you were there only if there was some kind of a problem and he needed some assistance?

A Correct.

* * *

[p. 173] Q What was the reason that you left the sheriff's office?

A I was let go.

Q And what was the reason for that?

A Well, actually, the corporal and I were in the courtroom and on a computer. They have computers in all the courtrooms, and I typed on the computer and the computer wasn't signed off. I typed on, if breasts were large, you would have – if breasts were brains, you would be a genius, and the computer went off. And a month later, the corporal told my lieutenant, and my lieutenant said, yes, and I was terminated.

* * *